SEP 20 1954

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954.

No. 355

ROBERT WENDELL HAINSWORTH, *Petitioner.*

vs.

HARRIS COUNTY COMMISSIONERS' COURT, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS.

ROBERT WENDELL HAINSWORTH

Counsel for Petitioner.
210 Pilgrim Building
222 W. Dallas Avenue
Houston 2, Texas

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IN THE

Supreme Court of the United States

October Term, 1954.

No._____

ROBERT WENDELL HAINSWORTH, *Petitioner.*

VS.

HARRIS COUNTY COMMISSIONERS' COURT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Robert Wendell Hainsworth, the petitioner herein, prays that a writ of certiorari be issued to review the final judgment of the Supreme Court of the State of Texas.

Reference to Opinions in Courts Below.

The opinion of the Trial Court, (R-C.C.A.-11, 12) is not reported. The opinion of the Trial Court was ren-

dered and entered on the 7th day of August, 1953, and is printed in Appendix B, hereto, *infra,* pp 15-17.

The opinion of the Court of Civil Appeals, (R-C.C.A.-20-23) printed in Appendix B, hereto, *infra,* pp 17-21, is reported unofficially in 265 S.W. 2d 217. The order of the Court of Civil Appeals in refusing the Motion for Rehearing, (R-C.C.A.-27) printed in Appendix B, hereto, *infra,* p 21, is reported unofficially in 265 S.W. 2d 217.

The opinion of the Supreme Court of Texas, (R-Sup. Ct.Tex.-Second Instrument, Per Curiam Opinion) will be reported officially in 153 Texas..... (Page number not yet assigned). Per Curiam Opinion is printed in Appendix B, hereto, *infra,* pp 21, 22. The date of the opinion in the Supreme Court of Texas was May 12, 1954.

The citation to the order of the Supreme Court of Texas Overruling the Motion for Rehearing, (R-Sup.Ct. Tex.-Third Instrument, Certified Copy of Judgment) will be reported officially in 153 Texas_____. (Page number not yet assigned.) The date of the order Overruling the Motion for Rehearing was June 23, 1954, and the order is printed in Appendix B, hereto, *infra,* p 22.

The opinion of the Supreme Court of Texas is also reported unofficially in 269 S.W. 2d 332.

Jurisdiction

1. On the 12th day of May, 1954, the Supreme Court of Texas, stamped the application for Writ of Error of petitioner, Refused. No Reversible Error. (with Per Curiam opinion.)

2. A timely Motion for Rehearing was subsequently filed on May 24, 1954, and the Supreme Court of Texas

on the 23rd day of June, 1954, Overruled this Motion for Rehearing. (R-Sup.Ct.Tex-Third Instrument, Certified Copy of Judgment.)

3. The statutory provisions believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is Title 28, United States Code, section 1257(3), which provides in part:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:" * * * * "(3) By writ of certiorari, * * * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * * * of the United States."

Questions Presented for Review.

1. Whether the rule and requirement by the Harris County Commissioners' Court that the petitioner sit at a table designated "Colored", in making use of the Harris County Law Library did not infringe upon any constitutional guaranty to him, and whether such a practice by the Harris County Commissioners' Court is prohibited by the Fourteenth Amendment to the Constitution of the United States?

2. Whether segregation by the State or any political subdivision thereof, solely because of color, such as the restricting and the limiting of a colored person or colored persons from the full, free, and unrestricted use of public facilities in a county courthouse, or of any public facility of the State or political subdivision of the State, by discriminatory practices or signs based solely upon color or race is prohibited by Section 1, of the Fourteenth Amendment to the Constitution of the United States?

Constitutional Provisions and State Statutes Involved.

CONSTITUTION OF THE UNITED STATES.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VERNON'S TEXAS STATUTES.

1948

Revised Civil Statutes

Articles 1697, 1698, 1699, 1700, 1701, 1702, 1702a-1. - Volume 1, pages 576, 577.

The pertinent text of the above Articles of the Revised Civil Statutes of Texas are set forth in Appendix A, *infra,* pp 13, 15.

Statement of the Case

That in the Harris County Law Library situated in Harris County, Texas, (R-C.C.A.-9, 10), there is a special table, designated "Colored", for the exclusive use of litigants and lawyers who are colored and which is restricted from use by those who are not colored; and when use of the library is made by colored litigants or lawyers one-at-a-time, they are restricted to the use of

such table but when use of the library is made by more of them than one-at-a-time, they are only restricted to the use of whatever table in the library to which they are assigned by the Librarian and the table to which they are assigned is restricted from use by litigants or lawyers who are not colored throughout the time of its being used by those who are colored.

That on December 20, 1951, the plaintiff petitioned the Harris County Commissioners Court to disapprove of the above policy of segregation and of designation of a table in the Harris County Law Library, "Colored", and in their practice of the restrictive use of tables in the Harris County Law Library on the basis of color.

That on January 24, 1952, the Harris County Commissioners Court, the Defendants, denied the petition of the plantiff.

Petitioner then filed suit against the Harris County Commissioners' Court on the grounds that such differences in treatment by the State based upon color or race is precluded by the Fourteenth Amendment to the Constitution of the United States, and petitioned for a writ of mandamus to require the defendants to remove the sign designated "Colored" from the table in the Harris County Law Library, and to stop the arbitrary practice of restricting use of tables in the Harris County Law Library on the basis of color, and for such other or further relief to which plaintiff may be entitled.

Stage in Proceedings and the Manner in Which the Federal Questions were Raised.

The stage in the proceedings in the court of first instance at which and the manner in which the federal

questions sought to be reviewed were raised was in the original petition of plaintiff. (R-C.C.A.-2-5)

The stage in the proceedings in the appellate courts at which, and the manner in which, the federal questions sought to be reviewed were raised, was by Points of Error on appeal from the court of first instance to the Court of Civil Appeals, (R-C.C.A.-33, 34), and by Points of Error on appeal from the Court of Civil Appeals to the Supreme Court of Texas. (R-Sup. Ct. Tex.-First Instrument, Application for Writ of Error, p 2.)

The way in which the federal questions sought to be reviewed were passed upon by the court of first instance and the appellate courts was by opinion of each of the courts.

The copy of the opinions of the court of first instance, and the Court of Civil Appeals and the Supreme Court of Texas, are included in Appendix B, hereto, *infra*, pp 15-17, 17-21, 21, 22.

Reasons Relied On For The Allowance Of The Writ.

1. The Supreme Court of Texas has decided federal questions of substance not heretofore determined by this Court, and has decided the federal questions in a way that is not in accord with applicable decisions of this Court.

While the precise federal questions presented here have not heretofore been determined by this Court, still there have been federal questions presented to the Supreme Court of the United States, in recent cases, which closely parallel the federal questions presented in this case and appear to be controlling. *Elmer W. Henderson vs. The United States of America Interstate Commerce Commission and Southern Railway Company,*

339 U.S. 816; *McLaurin vs. Oklahoma State Regents*, 339 U.S. 637.

Though the *Henderson* case relates to discrimination and segregation based on color or race, at a dining table while engaged in interstate travel, and the instant case relates to discrimination and segregation based on color at a law library table in a County Courthouse, the underlying principle in the two cases is the same, namely, segregation based upon color or race.

In the *Henderson* case, the question was "Whether the rules and practices of the Southern Railway Company which divide each dining car so as to allot ten tables exclusively to white passengers, and one table exclusively to Negro passengers, and which call for a curtain or partition between that table and the others violates Section 3,(1), of The Interstate Commerce Act. That section makes it unlawful for a railroad in interstate commerce "to subject any particular person, * * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: * * * * *"

The Supreme Court of the United States held: That those practices do violate the Act. The Supreme Court said: "The right to be free from unreasonable discriminations belongs, under section 3,(1), to each particular person." * * * "The curtains, partitions and signs emphasize the artificality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility."

So, in the instant case, it is respectfully submitted that the right to be free from unreasonable discriminations by the State or Governmental instrumentalities of the

State, belongs, under the Fourteenth Amendment to the Constitution of the United States, to each particular person. And the sign "Colored" on a table in the Harris County Courthouse Law Library only emphasizes the artificality of a difference in treatment which serves only to call attention to a racial classification of lawyers or litigants, using the same public facility of Harris County, namely, the Harris County Law Library, which is housed in the Harris County Courthouse.

The result is a conflict of principle in the decision of the Supreme Court of Texas in the instant case, with the decision of the Supreme Court of the United States in the *Henderson* case.

In the *McLaurin* case, the Appellant, *McLaurin,* was assigned to a certain table in the library, and assigned to a special table and restricted in other phases of University life, because of his race and color, and the Supreme Court of the United States held that under the circumstances of the *McLaurin* case, that the Fourteenth Amendment precludes differences in treatment by the state based upon race.

In the *McLaurin* case, the Supreme Court of the United States said that such restrictions impaired and inhibited Appellant's ability to study, to engage in discussions and to learn his profession. In the instant case, such restrictions and practices of segregation, *per se,* and such practices alone, and without more, make for differences in treatment by the State based upon race or color, and makes for inequalities by impinging upon the principle of "the dignity of man", the infringing upon the dignity of the individual so subjected to such restrictions and practices of segregation based upon color or race by the

State, and are in themselves and of such a nature, as to be humiliating, and a deprivation of liberty.

Thus there exists a conflict of principle, if not of decision also, in the ultimate decision of the Supreme Court of Texas in the instant case with the decision of the Supreme Court of the United States in the *McLaurin* case.

Also, a number of decisions of the Supreme Court of the United States have made it clear that the Fourteenth Amendment prohibits a State, an agency of the State or a political subdivision thereof from making classifications based on race or making racial distinctions in the exercise of governmental power. In *Hirabayashi vs. United States,* 320 U.S. 81; in *Korematsu vs. United States,* 323 U.S. 214; and in *Oyama vs. California,* 332 U.S. 633; the Supreme Court of the United States indicated that classifications by governmental agencies based solely on race or ancestry are particularly odious to our principles of equality.

And still in another recent decision, *Bolling vs. Sharpe,* decided by the Supreme Court of the United States on May 17, 1954, (citation not known) this Court said: "As long ago as 1896, this Court declared the principle 'that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race.' * * *." This Court also said in *Bolling vs. Sharpe, supra,* "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual

is free to pursue, and it cannot be restricted except for a proper governmental objective."

2. The opinion of the Supreme Court of Texas is believed to be erroneous, in that the record as to the facts of the case, as disclosed in the Stipulation of the Parties, (R-C.C.A.-9, 10), which taken together with the Original Petition of the Plaintiff, which was verified by Plaintiff, (R-C.C.A.-5), together with the applicable Statutes of the State of Texas pertaining to County Law Libraries, (R-Sup.Ct.Tex.-First Instrument, Application for Writ of Error-4, 5), printed in Appendix A, hereto, *infra*, together with the Bill of Costs, (R-C.C.A.-18), wherein the Law Library Fee of $1.00 is charged as other costs in accordance with Art. 1702A-1, Revised Civil Statutes of Texas, and is listed and itemized in Bill of Costs, together with the fact that the Honorable Trial Court took judicial notice of the fact that the plaintiff and petitioner was colored and an attorney practicing in Texas, all of which when taken and considered together, and which was before the Supreme Court of Texas, it is respectfully submitted, embody all of the facts necessary to be established by petitioner in order to present for decision the constitutional question of whether the rule and requirement by the Harris County Commissioners' Court that the petitioner sit at a table designated "Colored", in making use of the Harris County Law Library did not infringe upon any constitutional guaranty to him.

The decision of the Supreme Court of Texas decides the federal questions presented in such a way as to call for an exercise of this Court's supervisory powers and correction of a State judgment to the extent that the State judgment incorrectly adjudges federal rights.

3. The Supreme Court of Texas has decided important questions arising under the Fourteenth Amendment to the Constitution of the United States. And the questions presented to the Supreme Court of the United States are questions whose resolution will have immediate importance far beyond the particular facts and parties involved. The important federal questions may be summed up in the important principle, which is a basic principle underlying the Constitution of the United States, namely, the principle of "the dignity of man", the principle of "the dignity of the individual", and upon the proper resolution and determination of the questions presented here, rests the hopes and aspirations of a great many people in a number of the States of the Union, to be free from practices of segregation and discrimination based upon color in State or County buildings, or other public facilities of the State or political subdivisions of the State, which practices of segregation and discrimination based upon color, are put into force and made effective by and through State officers.

If this decision of the Supreme Court of Texas is allowed to stand, it will mean that lawyers and litigants who are colored, in making use of the library facilities in the Harris County Courthouse will be denied the equal protection of the laws, will be humiliated and deprived of liberty in being restricted and required to sit at a designated table with a sign thereon marked "Colored", and will be relegated to a type of second class citizenship.

If this and such similar practices of segregation in County Courthouses and other State buildings are allowed to stand by this Court, it will negate the principle of first class citizenship for all citizens, and will

constitute a denial to them by the State of the guarantee of the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

On the other hand if the Supreme Court of the United States will declare in the instant case that such practices of segregation by the Harris County Commissioners' Court to be unconstitutional, such a decision will enlarge the area of freedom and democracy for all citizens in a number of the States of the Union, and enable each citizen, irrespective of color or race, to walk in humility and in freedom, and in dignity in one's native State and in one's native land, in making use of the State's public buildings and facilities, with dignity equal to that accorded to all other citizens by the State.

For the reasons above stated, it is vital that the questions presented be decided finally by the Supreme Court of the United States.

Conclusion

For the foregoing reasons your petitioner respectfully submits that the writ of certiorari should issue to the end that this Court may review the decision of the Supreme Court of Texas and determine whether that court has deprived petitioner of rights guaranteed by the Fourteenth Amendment to the federal Constitution.

Respectfully submitted,

ROBERT WENDELL HAINSWORTH

Counsel for Petitioner.

APPENDIX A.

State Statutes.

Art. 1697. Establishment of library.— A county law library may be established at the county seat by the commissioners court of any county containing a city of over 160,000 population according to the preceding Federal census. (Acts 1st C. S. 1921, p. 21.)

Art. 1698. Appropriation for library.— The commissioners court of any such county may establish and provide for the maintenance of such law library on its own initiative and appropriate therefor the sum of $20,000.00 or such part thereof as it deems necesary, and shall appropriate each (year) such sum as may be necessary to properly maintain and operate such library. (Id.)

Art. 1699. Rules and Regulations.—Said court may make all rules and regulations necessary or proper for the establishment, maintenance, operation and use of said library not in conflict with the laws of this State. (Id.)

Art. 1700. Custodian.— Upon the establishment of a county law library the commissioners court shall employ a custodian or custodians of such library, who shall receive such pay as said court may fix, Each custodian shall execute a bond in the sum fixed by the court payable to and to be approved by the county judge of said county, conditioned that such custodian will faithfully perform his duties. (Id.)

Art. 1701. Gifts and bequests.— The commissioners court may receive on behalf of the county any gift or bequest for such library. The title to all such property shall be vested in the county. Where any gift or bequest

is made with certain conditions, and accepted by the county, these conditions shall be administered as designated by the donor. (Id.)

Art. 1702. Funds of library.— All funds of such library shall be in custody of the county treasurer of such county. They shall be a separate fund and shall be used for no other purpose than for such library. Each claim against the county law library shall be acted upon in like manner as other claims against the county. (Id.)

Art. 1702A-1. County law libraries in certain counties; management.—Section 1. For the purpose of establishing and maintaining a "County Law Library" for each county coming within the terms of this Act there shall be charged as costs, and taxed, collected, and paid as other costs, the sum of One ($1.00) Dollar in each civil case, except suits for delinquent taxes, hereafter filed in every County or District Court, in each county having eight (8) or more District Courts and three (3) or more County Courts including County Courts at Law. Provided, however, that in no case shall the county be liable for said cost in any civil cases. Such costs shall be collected by the Clerk of the respective Courts, and when collected shall be paid to the County Treasurer, to be kept by him in a separate fund to be known as the "County Law Library Fund"; such fund shall be administered by the Commissioners Court for the purchase, lease or maintenance of a law library, and furniture and equipment necessary thereto, in a place convenient and accessible to the Judges and litigants in such courts, and for the payment of salaries to employees to be appointed by the Commissioners Court; the Commissioners Court of counties affected by this Act shall make rules for the use of books in said library, and shall provide suitable space and shelving for housing same.

The salary of the custodian or librarian and such other employees or assistants as may be necessary shall be fixed by the Commissioners Court and shall be paid out of the funds collected under this Act.

The Commissioners Court of such counties may vest the management of such library in a committee to be selected by the Bar Association of such county, but the acts of such committee shall be subject to the approval of the Commissioners Court.

Sec. 2. The Provisions of this Act may be adopted by any county in this state having five (5) or more District Courts, by the passage of a Resolution to that effect by the Commissioners Court of such county at a regular session thereof with all members of such Court present.

Sec. 3. If any part or parts of this Act shall be held unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts of this Act. The Legislature hereby declares that it would have passed the remaining parts of this Act if it had known that such invalid part or parts thereof would be so declared unconstitutional. (Acts 1943, 48th Leg., p. 297, ch. 192.)

Appendix B.

Copies of Opinions of Courts Below.

No. E-401,906

Robert Wendell Hainsworth	In the District Court
vs.	of Harris County, Texas
Harris County Commissioners	129th Judicial District

Opinion of the Court

Since the oral arguments were heard in this case the other day, briefs have been read, and the court has given

the question involved considerable thought and consideration.

I have reached the conclusion that the United States Supreme Court's authorities cited by the plaintiff as *persuavise* as they are in favor of the relief requested are not applicable to the facts of this case. I take this view particularly in the light of the authorities of the United States Supreme Court cited by defense counsel and generally supporting the idea of segregation under those conditions where equal advantages and privileges are accorded all regardless of color.

Although the trend of the United States Supreme Court's decisions seems to be in the direction of the plaintiff's views, yet under the doctrine of *Stare Decisis* (the rule as to the preceeding case control) they are not sufficient as I see it to justify this court sitting as a judge in a sovereign State generally recognizing the principle of segregation, to issue its drastic Writ of Mandamus to override the Law Library Committee of this county and the government of Harris County, in its present plan of operating the law library for the benefit of the Bar generally.

The only complaint presented in this case is one as to segregation alone and it does not even hint at any different treatment as between white and colored lawyers generally. There is no different treatment assigned as to location of study tables, light, heat, air or use of law books or difference as to time of use nor in fact, is there any complaint as to any distinction being made as to any of the privileges and advantages accorded to all lawyers alike in the use of the library facilities. In the *McLaurin* case there is a situation complained of which is much broader in scope and deals with a colored stu-

dent who under the facts, was confronted with numerous acts of segregation which the United States Supreme Court found actually prevented him from getting equal advantages in education so as to prepare him for the profession of teaching and leadership in that field. The court said: "Such restrictions impair and inhibit his ability to study, to engage in discussion and exchange of views with other students and in general to learn his profession." In the instant case the situation deals simply with the complaint of segregation alone, to-wit: The labelling of a table "colored" to which lawyers of this race are assigned in the quiet atmosphere of a law library where open discussion is not expected or permitted and where under the facts as previously stated no distinction in treatment as to the use of the library facilities generally is alleged.

This court refuses to issue the Writ of Mandamus prayed for.

/s/ Dan W. Jackson,
Judge

ROBERT WENDELL HAINSWORTH, APPELLANT,

NO. 12,663

vs.

HARRIS COUNTY COMMISSIONERS' COURT,

APPELLEE.

Appeal from the District Court of Harris County

This appeal by the appellant, a colored man, is from a judgment of the 129th District Court of Harris County,

Texas, Hon. Dan W. Jackson, Judge presiding without a jury, denying the appellant, who was the sole plaintiff below, a writ of mandamus requiring the appellees, who constituted the Commissioners' Court of Harris County, Texas, and were defendants below "to remove the sign, designated 'Colored,' from the table in the Harris County Law Library and to stop the arbitrary practice of restricting use of tables in the Harris County Courthouse Law Library, on the basis of color."

The court's judgment was so rendered and entered upon an agreed statement of all the facts, as made and signed by the attorneys for the parties, which is appended hereto as Exhibit A, and made a part hereof.

This Court, after having had the advantage of written briefs and oral arguments from both sides, as indicated, and the appellant having orally argued the cause for himself here, as the sole party thereto, in the same way the trial court's record shows he had done below, is constrained to, in all things, affirm the judgment.

Since the action was one for mandamus only, the burden was upon appellant to both plead—and prove with particularity—everything necessary to sustain his action as such. *Houston Tap and Brazoria R. Co. v. Randolph,* 24 Tex. 317; *Johnson v. Elliott, Tax Collector;* 168 S. W. 968, writ ref.; *Harmon v. City of Dallas,* 229 S. W. 2d. 825 writ ref., n.r.e.

He had to show, not only that he had made all necessary preliminary demands therefor, but just what practice he was complaining about, and his own justiciable interest therein, *Harney v. Pickens,* 120 Tex. 268, 37 S. W. 2d 717; *Hursey v. Bond,* 141 Tex. 337, 172 S. W. 2d 305; 28 Tex. Jur. 552; *Mitchell, et al v. Dixon, et al,* 140 Tex. 520, 168 S. W. 2d 564, opinion adopted; *Yett v. Cook,* 115 Tex. 205, 281 S. W. 837.

As the stipulation of all the facts shows, none of the indicated prerequisites to the issuance of the mandamus writ so sought were complied with. Indeed, while appellant undertakes to state, as the basis of his appeal, four points of error, they are all, in effect, mere abstractions which are made the basis for a general discussion by him upon wholly abstract principles. As such they are based on general authorities, mostly opinions of the Supreme Court of the United States, based upon facts having no applicability whatever to those here involved, as shown by the appended stipulation. While those opinions, as appellant contends, deal with and discuss such general questions as "the dignity of man" and "segregation", and have much to say about the Fourteenth and Fifteenth Amendments to the Constitution of the United States, they have no remote applicability to the issues raised in this case and are founded wholly upon the quoted stipulation of all the facts that were therein involved.

Indeed, as this Court sees it, appellant has presented no question whatever as to there having been any infringement of any constitutional rights of his, unless it could be said that his having been so seated in the library without discrimination or inequality, and without any impairment to him of its benefits, had constituted a discrimination against him; whereas, he plead no discrimination, inequality, no injury or damage; nor did he make any effort to prove any one of such things. Whereas, further, it would appear that the Supreme Court of the United States itself has held that such single segregation—if it could be called that—of the appellant in this instance, did not infringe upon any constitutional guaranty to him. *Plessy v. Ferguson,* 163 U. S. 537, 16 S. C. 1138, 41 L. Ed. 256; *McCabe v. Atchi-*

son, Topeka & S. F. Ry. Co., 235 U. S. 151, 35 S. C. 69, 59 L. Ed. 169; *Boyer v. Garrett,* 183 F. 2d 582, Cert. den. 340 U. S. 912, 71 S. C. 293, 95 L. Ed. 659; *Day v. Atlantic Greyhound Corporation,* 171 F. 2d 59 *Carr v. Corning,* 182 F. 2d 14.

Further, since, in the absence of a statement of facts in the usual way and in the presence of the mutual stipulation as to what the controlling facts were here, it will be, upon this appeal, conclusively presumed that all findings which could have been made from the evidence were made by the trial court in favor of the appellees. *Commercial Credit Corporation v. Smith,* 143 Tex. 612, 187 S. W. 2d 363; *McElyea v. Parker,* 125 Tex. 225, 81 S. W. 2d 649; *Lane v. Fair Stores, Inc.,* 243 S. W. 2d 683.

The judgment will be in all things affirmed.

Affirmed.

/s/ Geo. W. Graves
Associate Justice.

Judgment rendered, and opinion filed February 18, 1954.

EXHIBIT A

That in the Harris County Law Library situated in Harris County, Texas, there is a special table, designated 'Colored', for the exclusive use of litigants and lawyers who are colored and which is restricted from use by those who are not colored; and when use of the Library is made by colored litigants or lawyers one-at-a-time, they are restricted to the use of such table but when use of the Library is made by more of them than one-at-a-time, they are only restricted to the use of whatever table in the library to which they are *assinged* by the Librarian and the table to which they are assigned is restricted from use by litigants or lawyers who are not

colored throughout the time of its being used by those who are colored.

"That on December 20, 1951, the Plaintiff petitioned the Harris County Commissioners' Court to disapprove of the above policy of segregation and of designation of a table in the Harris County Law Library, 'Colored', and in their practice of the restrictive use of tables in the Harris County Law Library on the basis of color.

"That on January 24, 1952, the Harris County Commissioners' Court, the Defendants, denied the petition of the Plaintiff."

ROBERT WENDELL HAINSWORTH

No. 12,663 **vs.**

HARRIS COUNTY COMMISSIONERS' COURT

It is ordered that appellant's original and amended motions for rehearing be refused.

Entered March 11, 1954.

IN THE SUPREME COURT OF TEXAS

No. A-4631.

ROBERT WENDELL HAINSWORTH

Petitioner,

v.

HARRIS COUNTY COMMISSIONERS' COURT

Respondent.

ON APPLICATION FOR WRIT OF ERROR.

Per Curiam.

The only record before us as to the facts of the case, and the only thing disclosed in the way of proof offered

at the trial, is a one-page stipulation of the parties which does not embody all the facts necessary to be established by petitioner (as plaintiff below) in order to present for decision the constitutional question discussed in petitioner's brief. The application will, accordingly, be stamped: REFUSED. NO REVERSIBLE ERROR.
Filed in SUPREME COURT OF TEXAS May 12, 1954.
Geo. H. Templin, Clerk

IN THE SUPREME COURT OF TEXAS

No. A-4631. **June 23, 1954**

ROBERT WENDELL HAINSWORTH

vs.

HARRIS COUNTY COMMISSIONERS COURT.

The motion for rehearing herein having heretofore been submitted to the Court and after due consideration of same, it is ordered that the said motion be, and is hereby, overruled.

APPENDIX C.

Copy of Judgment Sought To Be Reviewed.

IN THE SUPREME COURT OF TEXAS

No. A-4631 **May 12, 1954**

Robert Wendell Hainsworth
vs.
Harris County Commissioners Court

From Harris County First District.

This day came on to be heard the application of petitioner for a writ of error to the Court of Civil Appeals for the **First** District and the same having been duly con-

sidered, and the Court having determined that the application presents no error which requires a reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be refused; that the appellant, **Robert Wendell Hainsworth and his Surety, Lawyers Surety Corporation,** pay all costs incurred on this application.

June 23, 1954

(No. A-4631)

This motion for rehearing herein having heretofore been submitted to the Court and after due consideration of same, it is ordered that the said motion be, and is hereby, overruled.

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OCT 18 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 355

ROBERT WENDELL HAINSWORTH, *Petitioner.*

vs.

HARRIS COUNTY COMMISSIONERS' COURT, *et al., Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1954

No._____

ROBERT WENDELL HAINSWORTH, *Petitioner.*

vs.

HARRIS COUNTY COMMISSIONERS' COURT, *et al., Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Respondents, who are the County Judge and Commissioners' Court of Harris County, Texas, take no exception to the Petitioner's reference to opinions cited below nor the correctness of the Texas Statutes and Constitutional provisions set forth by Petitioner, and therefore the same are not repeated, pursuant to Rule 40(3) of the Revised Rules. Respondents recognize potential jurisdiction in the Supreme Court on

the basis of a "right . . . claimed under the Constitution . . . of the United States", but contend that no point for consideration has in fact been raised by this Petitioner.

Respondents further submit that the questions presented for review are incorrectly set forth in Petitioner's brief. Respondents contend that the only

QUESTION PRESENTED

is: *Whether the facts proved by the record were sufficient to require the trial court to issue its writ of mandamus under the laws of the State of Texas.*

CONCISE STATEMENT OF THE CASE

Robert Wendell Hainsworth, Petitioner, was plaintiff in in the District Court of Harris County, Texas, and Respondents, the County Judge and Commissioners' Court of Harris County, Texas, were defendants in the trial court. We shall designate the parties as they were designated in the trial court. Plaintiff sued defendants for a writ of mandamus to require defendants to remove the sign "Colored" from a table in the Harris County Law Library and to prevent practices of restricting the use of tables in the library on the basis of color. The *only* record developed at trial was the introduction of a stipulation agreed upon by the parties reading in its entirety as follows:

> "It is hereby stipulated in the above entitled and numbered cause as to the following Statement of Facts:
>
> "That in the Harris County Law Library situated in Harris County, Texas, there is a special

table, designated 'Colored', for the exclusive use of litigants and lawyers who are colored and which is restricted from use by those who are not colored; and when use of the Library is made by colored litigants or lawyers one-at-a-time, they are restricted to the use of such table, but when use of the Library is made by more of them than one-at-a-time, they are only restricted to the use of whatever table in the Library to which they are assigned by the Librarian and the table to which they are assigned is restricted from use by litigants or lawyers who are not colored throughout the time of its being used by those who are colored.

"That on December 20, 1951, the Plaintiff petitioned the Harris County Commissioners Court to disapprove of the above policy of segregation and of designation of a table in the Harris County Law Library, 'Colored', and in their practice of the restrictive use of tables in the Harris County Law Library on the basis of color.

"That on January 24, 1952, the Harris County Commissioners Court, the Defendants, denied the petition of the Plaintiff."

No witnesses were introduced and no proof was made beyond the above-quoted stipulation.

No statement of facts was filed on appeal in the state courts and no findings of fact were requested or made. The trial court filed an opinion and rendered judgment, making general findings that the evidence and facts of law were with the defendants.

ARGUMENT

Since no statement of facts was filed on appeal, actually the appellate courts of Texas had nothing before them to consider. Under Texas law, it is presumed that, in the absence of a statement of facts, all facts necessary to sustain the judgment were proved by the defendants and found by the court below. *Commercial Credit Corporation vs Smith* (Tex. 1945), 143 Tex. 612, 187 S. W. (2d) 363; *McElyea vs Parker* (Com. Apps. B., 1935), 125 Tex. 225, 81 S. W. (2d) 649; *Hursey vs Thompson* (Tex. 1943), 141 Tex. 519, 174 S. W. (2d) 317; *Anchor vs Wichita County Water Imp. Dist. No. 2* (Com. App. B., 1937), 129 Tex. 385, 103 S. W. (2d) 135, 112 A.L.R. 70; opinion adopted; *Lane vs Fair Stores, Inc.* (Tex. 1951), 243 S. W. (2d) 683. Even if all evidence introduced (being simply the stipulation) is to be considered, still there is no finding and in fact no evidence in the record of any of the following matters:

That plaintiff is a citizen of the State of Texas or of Harris County or that he is a practicing attorney or has any right or authority to use the Library at all; nor that the Library referred to is owned or operated by Harris County or under the cited statutes of the State of Texas.

There is in fact no evidence of any prohibition against plaintiff or any colored lawyer using any and all books in the Library; there is nothing to show that the table assigned to colored people is less advantageously situated than other tables with respect to lighting, air, closeness to books, or any other particular, and no impediment is shown to plaintiff's unlimited use of the library facilities; there is no showing that the

table is crowded and no showing of any insulting or derogatory remarks or that the Librarian or other attendants ever failed to assist the plaintiff in any way. In fact, there is not even any showing that Petitioner is colored and under Texas jurisprudence, a court will not take judicial notice of a litigant's color. *Fuller vs Texas Park Lot* (T.C.A., Ft. Worth, 1939), 133 S. W. 2d 605 (no writ). *Pauska vs Daus* (Tex. 1868), 31 Tex. 67.

There is no evidence (indeed no pleading) of any discrimination against plaintiff nor any inequalities suffered by him.

As the action is one for mandamus, plaintiff is required to plead and prove with particularity everything necessary to sustain the alleged cause of action and even to negative defenses and to prove all necessary allegations, even negative in nature.

Houston Tap and Brazoria R. Co. vs Randolph (Tex. 1859), 24 Tex. 317;

Johnson vs Elliott, Tax Collector (T.C.A., Texarkana, 1914), 168 S. W. 968, writ ref.;

Harmon vs City of Dallas (T.C.A., Dallas, 1950), 229 S. W. (2d) 825, writ ref., n.r.e.;

Sartin vs Hudson, et al (T.C.A., Ft. Worth, 1940), 143 S. W. (2d) 817;

Watkins vs Huff (T.C.A., San Antonio, 1901) 63 S. W. 922, writ dism., 94 Tex. 631, 64 S. W. 682.

King vs Guerra (T.C.A., San Antonio, 1927), 1 S. W. (2d) 373 (on motion to retax costs), 13 S. W. (2d) 908.

Plaintiff must also show that he has made all necessary requests or demands and has taken all necessary preliminary steps.

Harney vs Pickens (Tex. 1931), 120 Tex. 268, 37 S. W. (2d) 717;

Hursey vs Bond (Tex. 1943), 141 Tex. 337, 172 S. W. (2d) 305;

Kemp vs Wilkinson, District Judge (Tex. 1924), 113 Tex. 491, 259 S. W. 912;

Oliver vs Gallagher (Tex. 1930), 119 Tex. 178, 26 S. W. (2d) 903;

28 Tex. Jur. 552.

Among other things, plaintiff must show a justiciable interest; the exact import of the rule or practice complained of; that it applies to him; that it will deprive him of some right; that he expects to use or has reason to use the Library. The presentation of a mere abstraction or abstract right is not sufficient ground for writ of mandamus.

Mitchell, et al vs Dixon et al (Com. App. A, 1943) 140 Tex. 520, 168 S. W. (2d) 654, opinion adopted;

Yett vs. Cook (Tex. 1926), 115 Tex. 205, 281 S. W. 837;

McCarty vs Jarvis (T.C.A., Ft. Worth, 1936), 96 S. W. (2d) 564, writ dismissed;

Glover vs Cobb, et al (T.C.A., Dallas, 1938), 123 S. W. (2d) 794, writ refused;

Marr vs Reynolds (T.C.A., Eastland, 1941), 151 S. W. (2d) 263, writ dismissed, judgment correct.

Nor will a writ of mandamus be issued to plaintiff on account of any wrong done or threatened to anyone other than himself.

McLaughlin vs Smith (T.C.A., Amarillo, 1911), 140 S. W. 249, writ refused;

Armstrong vs Gaddis (T.C.A., San Ant., 1948), 214 S. W. (2d) 149.

Under principles of law governing mandamus actions, plantiff has completely failed to show any cause of action whatever.

The Petitioner has not by the record raised any actual point of controversy. At most, there are presented mere abstractions regarding segregation and the dignity of man but in no way related to any facts that were presented for consideration below to the trial court in the petition for mandamus. This Court has repeatedly refused to pass on abstract questions not presenting a justiciable controversy concrete in character showing a violation or threatened violation of rights of the person complaining. *Ashwander vs Tennessee Valley Authority*, 297 U. S. 288, 56 Supreme Court 466, 80 L. Ed. 688.

And, further, this court has repeatedly refused to pass upon constitutional questions, even though properly presented by the record, if there is also present some other ground upon which the case may be disposed of. *Ashwander vs Tennessee Valley Authority*, supra. The Texas courts have properly ruled on the application for mandamus, based upon the numerous Texas authorities above cited. Petitioner's application for writ of certiorari should be denied because he has not presented any Constitutional issue in the state court, and, in the alternative, because the state court judgment can be sustained on grounds independent of the Constitutional issue involved. *Berea College vs Kentucky*, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Certificate of Service

Two copies of the foregoing brief in opposition to Petitioner's Petition for Writ of Certiorari were delivered to the Petitioner, Robert Wendell Hainsworth, 210 Pilgrim Building, Houston 2, Texas, on this 16th day of October, 1954.

C. M. HUDSPETH,
Of Counsel for Respondents

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 355.

ROBERT WENDELL HAINSWORTH, *Petitioner*

v.

HARRIS COUNTY COMMISSIONERS' COURT, *Respondent*

REPLY BRIEF OF PETITIONER

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 355.

ROBERT WENDELL HAINSWORTH, *Petitioner*

v.

HARRIS COUNTY COMMISSIONERS' COURT, *Respondent*

REPLY BRIEF OF PETITIONER

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

It is respectfully submitted that the questions presented for review in the Petition for Writ of Certiorari are correctly stated therein, and that the Respondent is in error in stating that the question presented is: Whether the facts proved by the record were sufficient to require the trial court to issue its writ of mandamus under the laws of the State of Texas.

Accordingly, this Reply Brief is to show that the facts proved by the record were sufficient to require the trial court to issue its writ of mandamus under the laws of the State of Texas, for the two reasons listed below.

ARGUMENT

I. In Broad Aspect Of The Case No Special Right Need Be Shown

In petition of plaintiff in trial court, plaintiff

stated therein, " * * * all members of the bar of Harris County have the right to the use of the facilities without restriction based upon color * * * ". And the plaintiff sought, " * * * that on final hearing, Mandamus issue, ordering Defendants to remove the sign designated 'Colored', from the table in the Harris County Law Library and to stop the arbitrary practice of restricting use of tables in the Harris County Law Library, on the basis of color, * * * * ".

When the relief sought is merely for the protection of a private right, the relator must show some personal or special interest in the subject matter. But, otherwise, when the question is one of public right. In *McLaughlin v. Smith,* 140 S.W. 248, it was held: When the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the people ought to be regarded as the real party in interest, and that the relator, at whose instigation the proceedings are instituted need not show that he has any interest special and peculiar to himself, in the result and that it is sufficient to show that he is a citizen and as such interested in the execution of the laws.

II. Even Granting That Special Right In Petitioner Need Be Shown For The Issuance Of The Writ

Under Texas law, the writ of mandamus will issue: Where there is a clear legal right on the part of the petitioner; Where there is a legal duty on the part of respondent; and Where there is a breach of that duty by respondent.

Facts Proved By The Record Showing Clear Legal Right On Part Of Petitioner

The Final Judgment of the Trial Court (R-C.C. A.-) states therein within the first paragraph: * * * "and all matters of law and of fact having been submitted to the court, all parties thereupon announced that they had, subject to the court's approval, agreed upon a written stipulation to comprise the entire statement of facts in this cause", * * *. Thus, the Stipulation constituted the Statement of Facts in the cause.

In the petition of plaintiff in trial court which was verified, plaintiff alleged that he resided in Harris County, Texas; and that he was a duly licensed Attorney and Counsellor at Law of the State of Texas, and practicing in Harris County, Texas; and that there is located in the Harris County Courthouse of Harris County, Texas, a law library which is for the use of Attorneys and Counsellors at Law practicing in Harris County, Texas. Under Texas law, in mandamus actions, when the petition is verified and unverified general denial will be treated as a nullity. *Brown v. Reese,* 7 S.W. 489. The general denial of the respondent was not verified. Allegations are deemed to be admitted when they are not denied under oath. In mandamus proceedings an answer neither admitting nor denying a fact is an admission of the fact. *Giraud v. Winslow,* 127 S. W. 1180; *Houston Electric Co. v. Mayor & City Council of Houston,* 212 S. W. 198.

Authority to use the law library is shown in the Stipulation which states that in the Harris County

Law Library there is a special table, designated "Colored", for the exclusive use of litigants and lawyers who are colored and which is restricted from use by those who are not colored.

The segregation complained of in and of itself, the discriminatory practice and sign, based solely on color, in a County Courthouse or on State property, is a manifest inequality, and is unconstitutional, being directly prohibited by Section I, of the Fourteenth Amendment to the Constitution of the United States.

In the petition of plaintiff in trial court which was verified, plaintiff alleged that the plaintiff in making use of the Harris County Law Library, has been required in acordance with an arbitrary rule and practice of the Law Library Committee of Harris County to sit at a designated table in the law library with a sign thereon marked "Colored". This allegation shows that plaintiff is colored, and as it was not denied under oath, or even denied at all, in the answer of defendants in the trial court, is therefore admitted. *Brown v. Reese,* 7 S. W. 489; *Giraud v. Winslow,* 127 S. W. 1180.

The entire pleading of the parties, the petition of the plaintiff and answer of defendants, together with the stipulation, the final judgment and the opinions of the trial court, and the court of civil appeals, are instinct and replete with the fact, the understanding, and conclusion that the plaintiff is colored.

The trial court took judicial notice of the fact that the plaintiff was an attorney and of the fact that plaintiff was colored. In *Stripplemann and Another*

v. Clark, 11 Tex. 296, the court held: The signatures of attorneys of record are judicially known to the courts. The trial court in its opinion said: "Although the trend of the United States Supreme Court's decisions seems to be in the direction of the plaintiff's views, yet * * * they are not sufficient as I see it to justify this court sitting as a judge in a sovereign State generally recognizing the principle of segregation, * * * ".

The Court of Civil Appeals recognized and took judicial notice of the fact that appellant, plaintiff below, was colored by stating in its opinion that, "This appeal by the apellant, a colored man, * * * ". " * * * and the appellant having orally argued the cause for himself here, as the sole party thereto, in the same way the trial court's record shows he had done below, * * * " " * * * Indeed, as this Court sees it, appellant has presented no question whatever as to there having been any infringmement of any constitutional rights of his, unless it could be said that his having been so seated in the library without discrimination or inequality, and without any impairment to him of its benefits, had constituted, a discrimination against him; whereas, he plead no discrimination, inequality, no injury or damage; nor did he make any effort to prove any of such things. Whereas, further, it would appear that the Supreme Court of the United States itself has held that such single segregation—if it could be called that—of the appellant in this instance, did not infringe upon any constitutional guaranty to him. *Plessy v. Ferguson* 163 U. S. 537, 41 L. Ed. 256; * * * ".

Pauska v. Daus, 31 Tex. 68, and*Fuller v. Texas Park Lot,* 133 S. W. 2d 605, are inapposite. In *Pauska v. Daus,* it was held: That where the question of the right of negroes to sit upon a jury did not appear otherwise than in a motion for a new trial it could not be revised.

In *Fuller v. Texas Park Lot,* where there was testimony in the trial court as to the identity of two persons, one of whom would be liable for an injury inflicted by an automobile, the court of civil appeals though requested by counsel for appellee; could not take judicial notice of the color of appellee.

Facts Proved By The Record Showing A Legal Duty On The Part Of Respondent

The name of the Harris County Law Library as stated in the Stipulation indicates that the Library referred to is owned or operated by Harris County.

The $1.00 charged as costs, and taxed, collected and paid as other costs (R-C.C.A.-18) indicates that the Harris County Law Library is owned or operated by Harris County or under the cited statutes of the State of Texas.

The deliberation of the Harris County Commissioner's Court upon the petition of the plaintiff after presentation, and then their denial of the petition more than a month after presentation is indicative of their authority over the Harris County Law Library, and that the Harris County Law Library is a state instrumentality for they were acting as State officers in the regulation of the Harris County Law Library for State action means action not by private citizens

but by those clothed with the authority and the influence which official position affords. The vital requirement is State responsibility or county responsibility, that somewhere, somehow, to some extent, there be an infusion of conduct by officials, coupled with State or county power, into any scheme by which colored citizens are denied the equal protection of the laws, or deprived of liberty without due process of law, merely because they are colored.

Further and conclusive evidence that the Harris County Law Library is owned or operated under the cited statutes of the State of Texas is shown in the opinion of the trial court wherein the Trial Court stated: Although the trend of the United States Supreme Court's decisions seems to be in the direction of the plaintiff's views, yet under the doctrine of Stare Decisis (the rule as to the preceding case control) they are not sufficient as I see it to justify this court sitting as a judge in a sovereign State generally recognizing the principle of segregation, to issue its drastic Writ of Mandamus to override the Law Library Committee of this county and the government of Harris County, in its present plan of operating the law library for the benefit of the Bar generally". (Petition for Writ of Certiorari—P. 16).

Facts Proved By The Record Showing A Breach Of Legal Duty On The Part Of Respondent

In order to show a default, it must appear that performance of the duty has been demanded of the respondent and that the respondent has refused or failed to perform it. In *Harney v. Pickens,* 37 S. W.

2d 717, the case was before the Supreme Court of Texas, on motion for leave to file a petition for writ of mandamus, prohibition, etc. Held: Petition for writ of mandamus to enforce private right must generally allege performance of duty was demanded, and that respondent failed to perform or must allege conduct showing futility of demand for performance.

In the verified petition of plaintiff, the plaintiff alleged performance of duty was demanded, and that the defendants, or respondent failed to perform. The Stipulation also shows the request of plaintiff, and the refusal, by respondent.

CONCLUSION

It is respectfully submitted that a substantial Federal Constitutional question has been raised at the proper point in the state court proceeding. The decision of the Trial Court is not based on a non-federal ground, while the decision of the highest State Court is based on a non-federal ground, which non-federal ground does not independently and adequately support the judgment.

For the reasons above stated it is repectfully submitted that under Texas law the facts proved by the record were sufficient to require the Trial Court to issue its writ of mandamus.

Respectfully submitted,

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